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Nos. 82-185, 82-246, 82-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BOSTON FIREFIGHTERS UNION, LOCAL 718,
Petitioner

v.

BOSTON CHAPTER, NAACP, ET AL.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
Petitioner

v.

PEDRO CASTRO, ET AL.

NANCY B. BEECHER, ET AL.,
Petitioners

v.

BOSTON CHAPTER, NAACP, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR ROBERT LIPSHUTZ, ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. May a court modify a seniority statute on layoffs in order to preserve progress under a court-ordered affirmative action program, when unforeseen circumstances develop, and literal application of the statute would undo that progress?

2. Should a court direct the parties first to explore all alternatives to lay-off, including those which would have added financial burdens to the municipality, before resolving the conflict between the seniority statute and the affirmative action order?

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INTEREST OF AMICUS

Amici Robert Lipshutz, Herman Schwartz, Herbert Hershfang, Daniel Levenson and Kenneth Sweder, et al., are American Jews who believe in the preservation of the constitutional and legal rights of all Americans. They are active in Jewish organizations with similar goals.[1]

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[1] The *Amici* are: Robert Lipshutz, formerly Counsel to President Jimmy Carter, Co-Chairman, Commission on Law and Social

The issues raised by this case are momentous for the future of equal justice in America. Because *Amici* believe it vital that American Jews speak out to help avoid the undermining by fiscal austerity measures of the modest progress achieved in eradicating employment discrimination, *Amici* have taken the unusual step of filing a brief in their own names.

STATEMENT OF THE CASE

The judgment on appeal is from a consolidation of two separate cases against the Boston Police Commission and Boston Fire Commissioner. The City officials have not appealed from the order at issue; the petitioners are the police and fire-fighter unions, who are intervenor-defendants, and the State of Massachusetts.

1. The Police Department Case.

In 1970, black and Hispanic applicants for employment with the police department challenged the recruitment and certification priorities of the Boston Police Department as violative of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. They neither alleged nor tried to prove intentional discrimination because as the district court noted, "all parties recognize and the court holds that . . . plaintiffs need neither allege nor prove that defendants acted with intent or motive to discriminate." *Castro v. Beecher*, 334 F. Supp. 930, 935 n.1 (D. Mass. 1971).

Action, American Jewish Congress; Herman Schwartz, Member, Commission on Law and Social Action, American Jewish Congress; Herbert H. Hershfang, Esq., Chairman, Commission on Law and Social Action, New England Region American Jewish Congress, Past President, New England Region, American Jewish Congress; Daniel D. Levenson, Esq., Past President, New England Region, American Jewish Congress; Kenneth H. Sweder, Esq., President, New England Region, American Jewish Congress; David B. Cohen, Esq., State Representative, Commonwealth of Massachusetts; Sharon Goldzweig, Esq.; Frederick Mandel, Esq. Organizational affiliations are listed for identification only.

At this time, there were only 65 blacks out of 2805 Boston police officers—3.6% of the police force—even though blacks accounted for 16.3% of Boston's population. After a bench trial, the district court found that the 1968-70 examinations were discriminatory and not job related. *Castro v. Beecher*, 334 F.Supp. 930 (D.Mass. 1971). Upon remand from the Court of Appeals, 459 F.2d 725, 737 (1st Cir. 1972), the district court approved a consent decree giving certain black and Hispanic applicants a competitive advantage, and ordering the implementation of affirmative action programs aimed at this group.

A further consent decree was entered and supplemented on July 7, 1975 (with further supplementation on July 13, 1976 and June 1, 1975) mandating, *inter alia*, measures designed to facilitate the appointment of one minority police officer for each white until the force achieved a "complement of minorities commensurate with the percentage of minorities within the community."

Pursuant to these decrees, between 1974 and 1980, the Boston Police Department hired 492 officers, of whom 213 (43%) were minority, so that as of July 6, 1981, minority representation on the police force had risen to 11.7%.[2]

2. The Fire Department Case.

Unsuccessful minority applicants for firefighter positions and the Boston NAACP sued the Fire Commissioner in 1972 under 42 U.S.C. §§ 1981 and 1983; the Attorney General sued in 1973 under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et. seq.*, raising similar claims and the cases were consolidated. The district court found that while the combined minority population of Boston was 23%, blacks and Hispanics represented only 0.9% of the fire depart-

[2] By 1980, the minority population of Boston had increased to almost 30% of the general population.

ment's sworn personnel. *Boston Chapter NAACP, Inc. v. Beecher*, 371 F.Supp. 507 (D.Mass. 1974). The court ruled further that the 1968-1971 examinations were discriminatory, as was the word-of-mouth recruitment policy. It ordered "affirmative relief to remedy the present effects of past discrimination," which included active recruitment of minority firefighters, and priority certification groups for minority applicants. This relief was to remain in effect until parity was achieved between representation of minorities in the department and in the community at large. The Court of Appeals approved the decree as necessary "to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities." 504 F.2d 1017, 1027 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Further implementing orders were entered. Between 1974 and 1981, the court's decrees resulted in an increase of minority representation on the fire department to 14.7%, as the Department hired 248 minority firefighters out of 553 new sworn personnel.

3. Proposition 2½ and Its Consequences.

In the Spring of 1981, budgetary restrictions were imposed on the police and fire departments as a result of the passage of Proposition 2½, a tax limitation measure. The police and fire departments initiated reduction-in-force programs pursuant to the Massachusetts civil service and veterans preference statutes, Mass. Ann. Laws ch. 31, § 39; ch. 30 9A (1979), which require separation from service to be in reverse order of seniority except for veterans. Because the orders requiring minority hiring had been so recently entered, most of the officers to be laid off were to be minority: 122 of 252 police officers—48%—slated for lay-off were minority and 113 of 207 firefighters (54.6%). As a result of these firings, the minority representation on the police force would have dropped from 11% to 6.2%, and in the fire department from 14.7% to 9.1%.

Respondents thereupon moved pursuant to Fed.R.Civ.P. 60(b) to modify the existing decree, and the petitioner-unions were allowed to intervene as parties defendant.

4. The Decisions Below.

In an opinion and order dated August 7, 1981, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters' enacting Proposition 2½ amount to 'new and unforeseen conditions . . .,'" and that "'if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation on both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations.'" Pet. for Cert. in 82-246 12a. It noted further that to allow the lay-offs to occur as planned would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and firefighters, and would produce a "grievous wrong." *Ibid.*

To avoid these results, the Boston Police Commissioner and Fire Commissioner were enjoined from reducing, "pursuant to any departmental or city program of reduction in force on account of lack of funds or abolition of position," the percentage of minority officers below that obtaining at the commencement of the program. *Id.* at 2a-3a.

The Court of Appeals affirmed the orders of the district court, finding that the district court had the power to revise the consent decree, that neither the Massachusetts seniority statute nor this Court's seniority decisions barred the relief ordered by the district court, and that such relief was constitutional.

The court's order and Proposition 2½ resulted in the lay-off of 258 police officers and 257 firefighters. The

lay-off was only temporary, however, because in June 1982, Massachusetts enacted legislation providing new revenues for Boston and requiring the recall of all laid-off police and firefighters. By July 1, 1982, all personnel available for recall were reinstated.[3]

SUMMARY OF ARGUMENT

This case presents the painfully difficult question of who should suffer most from lay-offs resulting from the passage in Massachusetts of a tax limitation and expenditure measure, commonly called Proposition 2½. On the one hand, laying off minority workers hired in increased numbers under a court-ordered affirmative action program is inconsistent with a national commitment of the highest order to eradicate all vestiges of discrimination. On the other hand, laying off employees out of the sequence required by the bona fide seniority provisions embodied in Massachusetts civil service statutes and protected against challenge by Title VII is inconsistent with the senior employees' federally and state protected rights, the preservation of which also reflects a strong public commitment.

Upon the assumption that the court was required to resolve the stark conflict between these competing values, the court modified the state seniority requirements and incorporated an affirmative action component into the statute.

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[3] Police officers who were either laid off or demoted on November 10, 1981, ostensibly because of budgetary cutbacks, appealed to the Massachusetts Civil Service Commission ("The Commission") pursuant to the provisions of Mass. Ann. Laws Ch. 31 § 43 (1979). On January 20, 1983, the Commission voted to adopt the findings of fact of a hearing examiner, which included the determination that "the appointing authority had $1,129,714 available to it which it could have used to offset layoffs and demotions." The Commission concluded that the appointing authority had acted in bad faith and was ". . . utilizing Proposition 2½ as a cover for actions which were not motivated by reasons of economy at all." This administrative decision is subject to further judicial review. A copy of the opinion is being filed herewith as an Appendix.

Given the court's assumption, and as we argue below, its decision can be justified as a matter of law. Rigid seniority must be modified to allow the primary objective of the eradication of discrimination to proceed, and if that were all to the case, the decision below should be affirmed.

But the resolution of the conflict here may not have been necessary. The record does not show that either party advanced any alternative to avoid the conflict between seniority and preservation of the court's decree. For its part, the Court does not seem to have imposed upon the parties the obligation of devising and exploring such alternatives nor did it determine on its own whether less painful and more equitable alternatives were available. Thus, for example, work-sharing plans, reduced work weeks, elimination of overtime, payless holidays, rotational lay-offs, attrition plans, etc., should have been explored by the parties and the court.

Because it does not appear that these alternatives were fully explored, the courts below may have unnecessarily decided the question presented to this Court for review. This very difficult issue is thus not really ripe for decision, and the writ should be dismissed as improvidently granted. If, however, the Court believes it should decide the question, the decision below should be affirmed.

ARGUMENT

Introduction

Amici believe that the orders appealed from are within the equitable discretion of the Court, and are barred by neither Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, nor the Constitution. The type of remedy at issue here is within the district court's discretion, for the ultimate and "highest priority" is the eradication of discrimination and "the discriminatory effects of the past." *Franks v. Bowman*, 424 U.S. 747, 763 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

However, we believe that the court may have acted precipitously. The remedy ordered by the district court is on its surface destructive of valuable security interests. As will appear below, however, the collision might have been avoided by the Massachusetts officials charged in the first instance with care for the competing rights in question. The district courts faced with the problems presented here should, if at all possible, consider alternatives that are less painful, yet substantially preserve whatever progress was made under an initial decree that is still operative. Certain of these alternatives are explored below. However, if the alternatives are not feasible, then a modification of the kind adopted here is appropriate.

Normally, a remand to consider these alternatives would be in order. Here, however, all of the laid-off workers have already been reinstated and there is thus no reason to remand for consideration of alternatives. The order appealed from should therefore be affirmed or the writ dismissed as improvidently granted.

POINT I

THE MODIFICATION WAS WITHIN THE EQUITABLE DISCRETION OF THE COURT.

A. Equitable Principles Permit Overriding The Literal Application of the Seniority Statute.

The district court in this case confronted one of the most troubling dilemmas facing our society today: how to distribute the pains of fiscal austerity so as to prevent reversal of the modest gains made in the struggle against discrimination while not unfairly burdening innocent members of nonminority groups.

Recession and unemployment hurt many people, but minorities suffer the most. Because our nation has only recently undertaken to redress the centuries of segregation and discrimination, minorities have the shortest length of service, and when fiscal strains force cutbacks, they are the first to be laid off. "Layoffs by seniority 'lock in' the effects of past discrimination by continuing the advantage white males gained in employment by not having to compete with women and minorities." United States Commission on Civil Rights, *Last Hired, First Fired: Lay-Offs and Civil Rights* 36 (1977).[4]

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[4] The Commission found that fiscal cutbacks caused by the 1974-75 recession had a devastating effect on minorities in local government:

> The recent recession has had a critical impact on minorities and women. Many had only recently obtained their first promising jobs. Increasing numbers had begun to penetrate employment areas of great importance in our society, such as State and local government. Because they have not had time to acquire adequate seniority, however, minority members and women have been affected disproportionately by the personnel cutbacks occasioned by this recession, and much of their limited progress has thereby been obliterated. In light of dismal predictions of slow economic recovery and continuing high unemployment, this recession threatens to lock these groups into

If unemployment remains high, and the "last hired, first fired" approach continues to be widely followed, the modest progress achieved under Title VII and the Constitution in eliminating employment discrimination and its effects, will be undone. See *id.* at 60-61.

There may be no painless options, however, and in the end someone will probably have to pay a price. Even if conventional seniority governs and older white workers keep their jobs,[8] the more recently hired blacks will lose theirs. There is no objective calculus by which to calibrate which group will suffer the most from such layoffs, and no criteria by which to judge whose suffering is more unfair or painful.

Certain basic principles govern, however:

(1) The eradication of discrimination and "the discriminatory effects of the past," *Albemarle Paper v. Moody*, 422 U.S. at 418 is the "primary objective" of Title VII, *Franks v. Bowman*, 424 U.S. at 768 n.28, and represents a national commitment of the "highest priority." *Id.* at 763.

(2) District courts are empowered under § 706(g) with "wide discretion . . . to fashion the most complete relief possible," *Franks v. Bowman*, 424 U.S. at 785; *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324,

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place as a permanent, expendable economic and social underclass.

* * * *

In New York City, layoffs in mid-1975 of 371 female officers appointed since January 1973 by the New York City Police Department ended their brief tenure with the previously overwhelmingly male police force. Over half of all Hispanic city workers in New York lost their jobs between July 1974 and November 1975.

Last Hired, First Fired 60-61, 25-26.

[8] Some senior workers will still lose their jobs because of the veterans and perhaps other preferences under Mass. Ann. L. ch. 30, § 9A (1979). See Sol. Gen. Br. 8 n.7 and p. 13 *infra*.

361 n.47, 365 n.51 (1977), in order to "allow the most complete achievement" of that "highest priority." *Franks v. Bowman*, 424 U.S. at 770-71. This discretion includes the authority to modify a still-operative decree when circumstances change, in order to preserve and promote its purposes. *United States v. United Shoe Corp.*, 391 U.S. 244 (1968); *United States v. Swift*, 286 U.S. 106, 119 (1932); *cf. Wright v. City of Emporia*, 407 U.S. 451 (1972). If the original decree was legitimate, then a modification to prevent its undoing is equally legitimate.

(3) Seniority is a very important value. It is not a vested right, however, only an expectation, *Franks v. Bowman*, 424 U.S. at 778-79, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), and it is frequently overridden or modified to protect other interests, including the eradication of the effects of discrimination.

The first two points are well-established and need little discussion. The third, however, warrants some elaboration.

"This Court has long held that employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Franks v. Bowman*, 424 U.S. at 778. In this very case, for example, seniority is not the dominant determinant with respect to lay-offs—the veterans preference created by Mass. Ann. L. ch. 30, § 9A, takes precedence, and this has significantly affected who was laid off.[6]

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[6] It appears that because of two large hiring waves in 1977-78 and 1979-80, a potential layoff of 252 police officers would normally mean at most a variance of only about two years or so between the most junior minority retained and the most senior nonminority laid off, if seniority were the only facotr. The reason that the layoffs reached 19 white officers hired in 1970 is because of the Massachusetts statutory *veterans* preference. See Joint App. 90a; Sol. Gen. Br. 8 n.7. In the firefighters situation, there may be only about a one-year difference between the most senior nonminority fired and the most junior minority retained. Pet. for Cert. in No. 82-185 7. These specific factual details are another reason why these matters should be left to the district court's discretion.

And the veterans preference is quite common. *Franks v. Bowman*, 424 U.S. at 778; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) (agreement on veterans preference). Overcoming the effects of racial discrimination has also justified an override of seniority expectations, *Franks*, 424 U.S. at 779, either through "constructive seniority" as in *Franks*, or by agreement. *United Steelworkers v. Weber*, 443 U.S. 193, 198-99 (1979); *Savannah Printing Specialties v. Union Camp Corp.*, 350 F. Supp. 632 (S.D. Ga., 1972). Seniority may also be overridden by special preferences for union chairmen and other union officials. *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 526-27 (1949).

Indeed, seniority systems include so wide a variety of definitions, restrictions, conditions, and qualifications, and vary so greatly as to when seniority begins, how it is lost, what it covers, what it is subject to, how it is compiled, and more,[7] that modifying a particular system to prevent reversal of some modest gains for a congressional policy of the "highest priority," seems well within a court's equity discretion. A statute or a voluntary union-employer agreement could so modify it. *United Steelworkers v. Weber, supra; Tangren v. Wackenhut*, 480 F. Supp. 539 (D. Nev. 1979); *aff'd*, 658 F.2d 705 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1771 (1982); *Savannah Printing Specialties v. Union Camp Corp., supra.* In the cases at bar, both the district and appellate courts—who have lived closely with these cases for over a decade—noted that if they and the parties had foreseen that the decree might be undercut by recession-induced layoffs, the order would have initially provided for the kind of seniority modification ordered by the district court in 1981. Jt. App. 28, 25.

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[7] See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv.L.Rev. 1532, 1534 (1962); *Amer. Tobacco Co. v. Patterson*, 102 S.Ct. 1534, 1536 (1982) (promotions based on seniority plus certain qualifications); *Calif. Brewers Ass'n v. Bryant*, 444 U.S. 598, 606-08 (1980).

Of course, seniority should not be lightly overridden. As the cases cited by petitioners indicate,[8] seniority has a very high value. But as earlier noted, if the modification is set aside, more junior minority employees will be laid off, and except for seniority, there is no particular reason for imposing the burden on them—all are equally innocent and all will suffer from the layoff.

Petitioners and certain Amici try to make something of the fact that the lower courts found no evidence of purposeful discrimination. But as the district court stressed in the very first reported decision in the police case, plaintiffs did not even allege or try to prove a discriminatory purpose because "all parties recognize and the court holds that . . . plaintiffs need neither allege nor prove that defendants acted with intent or motive to discriminate." *Castro v. Beecher*, 334 F. Supp. 930, 935 n.1 (D. Mass. 1971). The Court of Appeals below suggested that had such a finding been necessary, "it is by no means clear that our decisions in the police and fire cases should have been different." Pet. for Cert. in No. 82-246 26a. In any event, the cases are here as instances of proven discrimination under the appropriate contemporary standards and should be adjudicated as such.

B. Section 703(h) Does Not Bar the District Court's Modification.

Petitioners assert that under *Int'l Brotherhood of Teamsters v. United States*, *supra*, § 703(h) bars the relief below. That assertion misconstrues the *Teamsters* decision. Although a concern for seniority bears on the appropriateness of any equitable relief that might be inconsistent with an applicable seniority system, both *Teamsters* and *Franks v. Bowman* establish that § 703(h)

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[8] The cases are distinguishable, however. For example, in *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057 (1982) (the danger was that seniority would be adversely affected *before* discrimination was proven; here, it is already proven.

only *defines* an illegal discriminatory practice and does not prevent a modification of seniority to provide "relief otherwise appropriate" to remedy an illegal discriminatory practice. *Franks v. Bowman*, 424 U.S. at 761-62; *Teamsters*, 431 U.S. at 346-47.

The Solicitor General argues further that the remedial portion of *Teamsters* precludes the relief ordered here, and that *Teamsters* and *Franks* restrict Title VII remedies to make-whole relief to those individuals who can prove they were actually discriminated against. Sol. Gen. Br. 15-19.

These cases establish no such limitation for they deal exclusively with the situation where the only persons seeking a remedy are those who claim—either as named individuals or as class members—to have been victimized by discrimination. These cases do not deal with affirmative action remedies where the claims and remedial rationales are quite different—to bring minorities into the mainstream of the society by "open[ing] employment opportunities for Negroes in occupations which have been traditionally closed to them." *United Steelworkers v. Weber*, 443 U.S. at 208. The Court's refusal in *Teamsters* to grant relief to those who could not prove discrimination is simply an insistence that those individuals who claim to be victims of past discrimination, must prove it before they can get compensatory relief. That refusal implies nothing as to whether affirmative action remedies may not also be available for a group in the future, remedies that will necessarily benefit those who were not victimized by the discriminatory practice.

To put it differently, these cases establish the *legitimacy* of make-whole relief, but not its *exclusivity*. Otherwise, it is difficult to understand how at least three members of the *Teamsters* majority could either write or join in opinions the very next year in the *Bakke* case which explicitly approved affirmative action remedies in Title VII cases without even mentioning *Teamsters*. See *Re-*

gents of the University of California v. Bakke, 438 U.S. 265, 301-02 (1978) (Powell, J.); *id.* at 366 (Blackmun and White, JJ.). See also *Fullilove v. Klutznick*, 448 U.S. 448, 510-11, 513 (1980) (Powell, J.).[9]

C. Section 706(g) Does Not Bar the District Court's Modification.

Petitioners and Amici AFL-CIO and the Solicitor General invoke the last sentence of § 706(g) to contend that a court may order relief only for individual identifiable victims of the discriminatory practice. The AFL-CIO argues further that not only does that provision render the modification at bar illegal, but the original numerical ratio decrees as well.

The contention in either its limited or its sweeping form is contrary to the plain meaning of the section, the legislative history, and the assumptions and actions of this Court; if adopted, it would cripple Title VII enforcement.

The legislative history on this point is clear. As the Joint Explanatory Statement of Managers at the Conference on H.R. 1746 makes clear, the section—which was only declaratory of existing law—simply reiterates that a Title VII remedy is available to a court only for cases of "unlawful employment practices under Title VII." See Subcommittee on Labor of the Committee on Labor and Public Welfare, *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. 1839 ("1972 Leg. Hist."). The section implies nothing about the very special situation of how a court preserves a decree already entered after a finding of discrimina-

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[9] Though dissenting on the merits, Justices Marshall and Brennan concurred generally in the remedial aspects of *Teamsters* relied on by the Solicitor General. 431 U.S. at 377, n.1 (Marshall, J., concurring and dissenting), and yet the following year in *Bakke* they also expressed their support for affirmative action decrees in a Title VII context without seeing any apparent consistency. See 438 U.S. at 366-68.

tion. As the Third Circuit put it, "The sentence merely preserves the employer's defense that the non-hire, discharge, or non-promotion, was for a cause other than discrimination." *Equal Employment Opportunity Commission v. AT&T*, 556 F.2d 167, 176 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978). The last sentence of § 706(g) thus imposes no limitation on the remedy, once discrimination is found.

The Solicitor General's and AFL-CIO argument also minimizes the significance of the 1972 addition to the first sentence of § 706(g). In the 1964 Act, Congress provided that once discrimination is found, a court could order "such affirmative action as may be appropriate." In 1972, however, the Congress added language which allowed a court to go beyond the remedies specified, and concluded the sentence with the sweeping addition "or *any other relief* as the court deems appropriate." (emphasis added)

The AFL-CIO brief claims that this last sentence is limited to "make-whole relief" and that "there is not a word in the legislative history to suggest that other equitable relief was added to § 706(g) to authorize quota remedies." AFL-CIO Br. 15.

"Going beyond the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances." *American Tobacco Co. v. Patterson*, 102 S.Ct. 1534, 1540 (1982). And the legislative history of Title VII is hardly so unambiguous as to offer "the best of circumstances." See the comments on the legislative history of § 703(h) in *id.* at 1540 n.15; Note, *The Supreme Court, 1981 Term*, 96 Harv.L.Rev. 1, 287 (1982) (a "morass"). But as the United States argued to this Court in *Weber*, see *Brief for the United States and the Equal Employment Opportunity Commission, United Steelworkers of America v. Weber*, pp. 28-35, 63-71, ("U.S. *Weber* Br. ——") the issue of quotas and numerical remedies was very much on

Congress' mind with respect to Title VII.[10] Thus, "prior to the enactment of the 1972 amendment, the Federal Courts regularly, and with notable uniformity [in at least five circuits] ordered class-wide race-conscious remedies . . . [including] the use of numerical ratios." U.S. *Weber* Brief 32-33. Congress was very much aware of this and made clear in its analyses of the final version of the bill that it intended to make "present case law . . . govern." 1972 Leg. Hist. 1844 (Sen.), 1856 (House) (analyses accompanying Conference Reports).

"Congress' perception of the law that it was shaping or reshaping" is crucial. *Merrill, Lynch, Pierce, Fenner & Smith v. Curran*, 102 S.Ct. 1825, 1839 (1982). Obviously, "[i]t is always appropriate to assume that our elected representatives, like other citizens know the law." *Ibid.*

The only fair conclusion from this sequence of events is that Congress approved the use of affirmative action under Title VII as a remedy where employment discrimination is proven.

And, as in the *Merrill Lynch* case, 102 S.Ct. at 1840, "this Court, as did other federal courts and federal practitioners, [has] simply assumed" the propriety of such relief. See *Regents of the University of California v. Bakke*, 438 U.S. at 301-02 (Powell, J.); *id.* at 366-67 (Brennan, Marshall, White and Blackmun, JJ.); *Fullilove v. Klutznick*, 448 U.S. 448, 510-11, 513 (1980) (Powell, J.); *cf. General Bldg. Contractors Ass'n v. Pa.*, 102 S.Ct. 3141, 3155 ("Nor is the imposition of minority hiring quotas directly upon petitioners the sort of remedy that may be imposed without regard to a finding of liability"); *Contractors Ass'n of Eastern Phila. v. Sec'y of*

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[10] The House Committee Report accompanying the House bill stated that "Affirmative action is . . . essential for more effective enforcement of Title VII in remedying employment discrimination." 1972 Leg. Hist. 73.

Labor, 442 F.2d 159, 175 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

The Union position also produces an anomalous result. In *Weber*, the Steelworkers argued and the Court agreed that voluntary remedial goals were permissible without proof of discrimination. Is it reasonable that a numerical goals remedy disadvantaging senior white workers is permissible (even to the extent of overriding seniority) simply by a private agreement of the parties and absent *any* evidence of discrimination, but not if judicially and publicly imposed *after a finding of flagrant discrimination?* Surely that would be astonishing in a statute which gives courts the power to "fashion the most complete relief possible" in order to "allow the most complete achievement" of the eradication of discrimination and its effects, and it runs counter to opinions frequently expressed in this Court. See, *e.g.*, Powell, J., in *Bakke*, 348 U.S. at 302. Indeed, *Weber* has been interpreted by one of the nation's leading experts on Title VII as implicitly approving judicially ordered numerical goals. Blumrosen, *Affirmative Action In Employment After Weber*, 34 Rutg. L.Rev. 1, 39 (1981).

D. The Constitution Does Not Prohibit the Relief Ordered by the District Court.

Petitioners claim also that a court violates the equal protection aspect of the Fifth Amendment when it orders relief that disadvantages whites. But this Court's decisions and opinions unequivocally refute such contentions. In both *Regents of the University of California v. Bakke*, *supra* and *Fullilove v. Klutznick*, *supra*, the Court held that race-conscious measures to remedy the effects of discrimination are permissible, even if they involve numerical quotas, favor unidentified group members, burden non-minorities, 438 U.S. at 448; 448 U.S. at 484, 514, and are not the "least restrictive means of implementation." *Id.* at 508. And such race-conscious numerical goals can be used to remedy discrimination even if the

beneficiaries are non-victims, as they will often be in school desegregation contexts, *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971); university admissions (*Bakke*); or minority set-asides, and even if the violation is only statutory and not constitutional. *Fullilove*, 448 U.S. at 483, 510, 513 (Powell, J.). Nor is it a decisive objection that "it may disappoint the expectations of nonminority" members, *id.* at 484, 514, whether those expectations be nonspecific as in the contracting context, or specific, as in the seniority setting. As Justice Powell noted, " 'a sharing of the burden' by innocent parties is not impermissible. *Franks, supra* at 777; see *Albemarle Paper Co., supra*; *United Jewish Organization* [*v. Carey*, 430 U.S. 144 (1977)], *supra*." *Id.* at 484.

In *Bakke*, Justice Powell also posited a state interest other than past discrimination, to justify a race-conscious approach—a diverse student body in order to obtain a diversity of views. So here, a representative number of blacks on the police and fire departments has been shown to be a vital state interest. Reports by the National Advisory Commission on Civil Disorders (Kerner Commission), the Civil Rights Commission and others, have made it clear that public safety and the avoidance of riot and disorder require an integrated police force. Indeed, Title VII was amended to include state and local governments, partly in order to deal with this problem. See, *e.g.*, S. Rep. No. 415, 92d Cong., 2d Sess. 10 (1971); *Talbert v. City of Richmond*, 648 F.2d 925 (4th Cir. 1981); *Detroit Police Officers Ass'n v. Young*, 608 F.2d 671, 696 (6th Cir. 1979): Note, *Race As An Employment Qualification to Meet Police Department Operational Needs*, 54 N.Y.U.L.Rev. 413, 427-30 (1979) (citing studies).

POINT II

OPTIONS ARE AVAILABLE TO A DISTRICT COURT IN ORDER TO SAFEGUARD THE PROGRESS UNDER AN AFFIRMATIVE ACTION DECREE WITHOUT ENCROACHING UPON SENIORITY.

A district court thus has and should exercise the power to preserve any modest gains achieved under a still-operative decree, and to prevent the minority representation from falling much below the level achieved. See *Brown v. Neeb*, 644 F.2d 551, 565-66 (6th Cir. 1981) (Brown, J. concurring) ("The City should be preliminarily enjoined from laying off in such a way that would reduce the proportion of minority persons in the fire department."). The type of modification entered below obviously accomplishes that purpose, but it entails burdening innocent nonminority workers. Such a burden, the lay-off of innocent people who have worked at their jobs for many years and who themselves have discriminated against no one, is a dismaying propect. A district court should try to avoid such layoffs, and should explore alternatives before adopting such a course.

A variety of options are available. *Last Hired, First Fired* 49-55; Joseph, *Last Hired, First Fired: Seniority, Layoffs, and Title VII: Questions of Liability and Remedy*, 11 Col.J.L. & Soc'l Probs 343, 398-400 (1975). These include work-sharing plans, reduced work weeks, elimination of overtime in both the department in question and elsewhere, payless holidays, rotational layoffs under which all employees are laid off for a limited period, attrition or simply exempting city departments that are under a Title VII order or consent decree from the operation of Proposition 2½. See *Brown v. Neeb*, 644 F.2d at 566 ("the City may . . . refrain from laying off in the fire department and seek savings in other areas . . . .").

Further, there is no reason to accept the assumption that Proposition 2½ precludes the state from having the power if ordered by the court.[11]

In *United States v. Peters*, 5 Cranch 114, 3 L.Ed. 53, 59 (1808) the Supreme Court considered the propriety of a law passed by the Pennsylvania legislature authorizing the Governor to frustrate a money judgment of the Federal Court. In insisting that the Court's order be obeyed, Chief Justice Marshall wrote:

> "[I]f the Legislatures of the several states may, at will, annul the judgments of the court of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery. . . ."

In *Cooper v. Aaron*, 358 U.S. 1, 17 (1958), involving school desegregation, a unanimous Supreme Court reaffirmed this principle. The Court stated:

> "In short, the constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislatures . . . nor nullified indirectly. . . ."

The Court rejected the defense of the Board of Education that "vindication of [constitutional] rights was rendered difficult or impossible by the actions of" the legislature. *Id.* at 16.

These alternatives are indeed less onerous on non-minority employers and consistent with the operation of

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[11] Since the affirmative action orders have as their source of authority the Fourteenth Amendment, either directly or through the Civil Rights Act of 1871 or Title VII of the Civil Rights Act of 1964 as amended, the Eleventh Amendment defense against the power of the Federal Courts is not available. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Even if the State enjoys Eleventh Amendment immunity, the City of Boston and the police and fire departments do not. *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964); *Lincoln County v. Lemung*, 133 U.S. 529 (1889).

the seniority system. *Amici* therefore believe that in any case involving possible lay-offs, these alternatives should be considered by the parties and the trial court in a manner consistent with the goal that the progress achieved should not be undercut, which is the bedrock consideration. See *Brown v. Neeb, supra.*

The power of the District Court to order the police and fire departments to consider alternatives consistent with its prior order is clear. In *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658 (1979) the Supreme Court said, "It is also clear that [the State Departments of] Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so." See also *North Carolina Board of Education v. Swann,* 402 U.S. 43 (1971); *Griffin v. County School Board,* 377 U.S. 218 (1964); *Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320 (1958).

In *Swann* the Court said:

> "School authorities have wide discretion in formulating school policy . . . . However, if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall. *State policy must give way when it operates to hinder vindication of federal constitutional guarantees.*" 402 U.S. at 45.

Finally, in *Rhem v. Malcolm,* 507 F.2d 333, 341, (2d Cir. 1974) quoting from *Hamilton v. Love,* 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) the Second Circuit held:

> "Inadequate resources can never be an adequate justification for the State's depriving any person of his constitutional rights."

In *Welsch v. Likins,* 550 F.2d 1122 (8th Cir. 1977) the Minnesota legislature refused to appropriate funds to

improve an institution for the mentally retarded despite an express court order that the State operate the institution in a constitutional manner. The State contended that its obligation to effectuate the constitutional rights of the mentally retarded was, in effect, contingent upon the actions of the state legislature with respect to any specific budget request. The Eighth Circuit rejected the State's defense, and stated:

> "If Minnesota chooses to operate hospitals for the mentally retarded, the operation must meet minimal constitutional standards, and that obligation may not be permitted to yield to financial considerations. * * *. There must be no mistake in the matter. The obligation of the defendants to eliminate existing unconstitutionalities does not depend on what the Legislature may do, or upon what the Governor may do, or, indeed upon what defendants may be able to accomplish with means available to them. As stated, if Minnesota is going to operate institutions like Cambridge, their operation is going to have to be consistent with the Constitution of the United States."

550 F.2d at 1132.

Thus, given the clear power of the court to ensure that its original affirmative action orders not be undone, claims of financial consideration do not end the inquiry. Rather, these claims themselves should have been explored and all alternatives considered before the assumption was accepted that the clash between seniority and affirmative action had to be resolved by the courts below.

Because these alternatives were not considered, the courts moved to decide the difficult question of reconciling seniority with the eradication of discriminatory effects without explicitly determining whether that was necessary. It thus appears that insofar as the writ was granted to resolve that issue, it was premature and should be dismissed as improvidently granted.

CONCLUSION

For the reasons stated, the judgment should be affirmed or the writ dismissed as improvidently granted.

Respectfully submitted,

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February 7, 1983

APPENDIX

[SEAL]

THE COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place, Boston, MA 02108

Regina L. Quinlan, Esq.
6 Becaon Street
Boston, Massachusetts 02108

RE: Edward J. McNelley, Gerald V. Doucette, Thomas P. Maloney, Walter J. Casale, Sheila Kaplan, William T. Morrissey, Charles R. Webb, Howard Dacey, Margaret O'Malley, James Moore, William Sweeney, Donald Green v. the Boston Police Department, D-1465

SUBJECT: Appeals brought under the provisions of Chapter 31, Section 43, of the General Laws with respect to the appellants' demotions from their positions of Police Sergeant, respectively.

DESIGNATED HEARING OFFICER: Robert E. Tierney, Esq.

DECISION: The Civil Service Commission voted on January 20, 1983 at its executive meeting at 2:45 p.m. to acknowledge receipt of the report of Hearings Officer Robert Tierney, dated November 12, 1982, to adopt the findings of fact contained therein, and to reverse the action of the appointed authority. The Commission does not seek to inject itself into management decisions or to interfere with management prerogatives. That is not the issue here, no matter how vociferously the appointing authority may argue otherwise. On the contrary, the actions of the appointing authority are such a flagrant violation of any standard even remotely resembling rational personnel practices that a conclusion that the appointing authority acted in bad faith is inescapable. This conclu-

sion is buttressed by the appointing authority's use of available monies to pay overtime at time and a half to officers who were being retained on the force rather than using those funds to compensate other laid off officers at straight time to perform the same work. This hardly smacks of austerity or economy, let alone sound management. The Commission, accordingly, finds the appointing authority totally lacking in credibility. Indeed, the Commission concludes that the appointing authority was utilizing Proposition 2½ as a cover for actions which were not motivated by reasons of economy at all. The appointing authority is directed to restore the appellants to their respective positions without loss of compensation or other rights.

A copy of the hearing officers report is available upon request.

COMMISSIONERS: James W. Agoritsas, Chairman (in favor) John F. Donegan (in favor), Richard H. Linden (in favor), Joseph M. Duffy (in favor), and Wayne A. Budd (against).

A true record. Attest:

/s/ Victoria M. Douglass
VICTORIA M. DOUGLASS
Secretary to the Civil
Service Commission 2-3-83

VMD/dg

cc: Lawrence J. Ball, Esq.